

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 2 March 2022

Public Authority: Independent Office for Police Conduct

Address: 90 High Holborn
London
WC1V 6BH

Decision (including any steps ordered)

1. The complainant has requested, from the Independent Office for Police Conduct (the "IOPC"), information about an investigation it undertook in respect of allegations of corruption. The IOPC withheld the requested information citing the exemptions at sections 30(1)(a)(i) and 30(2) (Investigations and proceedings), and 40(2) (Personal information) of FOIA. It later removed reliance on section 30(2).
2. During the Commissioner's investigation, the IOPC accepted that some information, which is contained within nine reports, could be disclosed. The Commissioner agreed that the remainder was appropriately withheld under section 40(2) of FOIA. However, in failing to provide disclosable information by the completion of the internal review the Commissioner finds breaches of sections 10(1) and 1(1)(b).
3. The Commissioner requires the IOPC to take the following steps to ensure compliance with the legislation:
 - disclose the agreed text from within each of the nine reports.
4. The IOPC must take these steps within 35 calendar days of the date of this decision notice. Failure to comply may result in the Commissioner making written certification of this fact to the High Court pursuant to section 54 of the Act and may be dealt with as a contempt of court.

Background

5. The request refers to "Operation Embley". This was an investigation by the IOPC into allegations of corruption in the Directorate of Professional Standards ("DPS") in the Metropolitan Police Service ("MPS").
6. Further details about Operation Embley can be found on the IOPC's website¹. On 21 May 2019, the IOPC advised the following:

"Our investigation into allegations individuals within the Metropolitan Police Service's (MPS) Directorate of Professional Standards (DPS) abused their position to affect ongoing investigations is making good progress.

We received a total of 38 allegations relating to 15 officers and one member of police staff. Following an extensive scoping exercise and review of evidence, our investigation focused on 21 allegations concerning eight officers and one member of staff. The officers are between the ranks of Chief Inspector and Chief Superintendent.

All those individuals have been served notices informing them they are under investigation for a potential breach of professional standards. It should be noted that the serving of a notice does not in any way indicate disciplinary proceedings will follow.

The allegations include:

- interference in investigations to downgrade the severity of charges laid against an officer
- interference to assist an officer accused of wrong-doing, ignoring a potential conflict of interest, failing to properly engage with evidence presented and abuses of process while conducting an investigation into an allegation of racist behaviour being dropped in order to protect the reputation of MPS.

The allegations relate to more than 25 internal investigations.

The investigation is also considering whether there are systemic issues within DPS processes".

7. On 26 October 2020, the IOPC made a further statement on its website² which included the following:

¹ <https://www.policeconduct.gov.uk/news/recommendations-met-reinforce-changes-working-practices-within-directorate-professional>

"This has been a very detailed and complex investigation which found the allegations were either not corroborated or were disproved by the evidence...

Our investigation examined if there were systemic issues within processes, culture, leadership and internal communication within the DPS. We looked at why the allegations had been made, the context at the relevant time and the systemic issues that may be involved.

We did establish that the Directorate's working practices at the time lent themselves to the possibility of perceptions of prejudice through a lack of communication between officers and a lack of understanding of and adherence to misconduct regulations. Internal process changes in who should act as the Appropriate Authority for certain types of cases were not communicated well and brought about confusion to the wider team of officers.

Since our investigation the DPS has changed its internal processes and now allocates an officer from a dedicated unit rather than from within the team to conduct an investigation and is also working to improve communication between officers.

... A summary of our investigation and our learning recommendations will be published in due course".

8. On 31 August 2021, subsequent to the request being considered here, the IOPC published its recommendations³.

Request and response

9. On 15 January 2021, the complainant wrote to the IOPC and requested information in the following terms:

"Good morning, I stumbled across a BBC article "'No case to answer' for Met professional standards unit investigation"

(<https://www.bbc.co.uk/news/uk-england-london-54668260>) which

² <https://www.policeconduct.gov.uk/news/investigation-nine-metropolitan-police-staff-directorate-professional-standards-concludes>

³ <https://www.policeconduct.gov.uk/recommendations/recommendations-metropolitan-police-service-august-2021>

appears to be about Op EMBLEY.

I cannot find a copy in your investigations summary:

https://policeconduct.gov.uk/investigations/investigation-summaries-and-learningrecommendations?field_related_by_topic_tid=1055&field_related_by_topic_tid_1=All&date_filter%5Bvalue%5D%5Bmonth%5D=&date_filter%5Bvalue%5D%5Byear%5D=&page=2

Please send me (FOIA) a minimally redacted copy of the full report.

I made an FOIA request for the TORs [terms of reference] for Op EMBLEY, but cannot find them published on your website. Is that correct?"

10. On 12 February 2021, the IOPC responded. It refused to provide the requested information. It cited sections 30(1)(a)(i), 30(2) and 40(2) of FOIA as its basis for doing so.
11. The complainant requested an internal review on 14 February 2021. The IOPC responded on 24 March 2021; it maintained its position.
12. During the Commissioner's investigation the IOPC removed reliance on section 30(2), so this will no longer be considered.
13. The Commissioner has liaised at length with the IOPC in an effort to disclose as much content from the reports as possible without revealing any personal information of the parties concerned. To prevent any further delay, he agreed that a decision notice would be issued requiring disclosure of what was agreed rather than the IOPC making a direct disclosure to the complainant. The Commissioner does not consider that the complainant is in any way disadvantaged by this approach.

Scope of the case

14. The complainant contacted the Commissioner on 27 March 2021 to complain about the way his request for information had been handled. In his grounds he advised:

"I suspect that IOPC's summary will gloss over issues, and thus I wish to see the full report, minimally redacted to conceal identities. One of IOPC's reasons to decline is that "The redaction of exempt information would result in these reports being so heavily edited that the information we disclose would not assist the public in understanding the investigation." That is not a lawful reason, nor is it true. I gained some fascinating insights into Op EMBLEY from the

(heavily) redacted TORs, including the fact that detailed TORs were shared with MPS 6 months before the investigation, which hardly gives confidence in the integrity of the investigation. The integrity of the police oversight function, in particular IOPC, is currently / still in doubt. I request that the full reports, minimally redacted, be published, that the public may make up their own minds.

... What looks like IOPC covering up does nothing to reassure the public that they are transparent or honest. One of the problems with the police's currently questioned legitimacy seems to be that what may be legal for the police (and DPS) to do is not necessarily what the public believe to be right (ie legitimate) - a sizeable democratic deficit. Dir Noolan's [sic] comment that "the directorate's working practices at the time lent themselves to the possibility of perceptions of prejudice" re-inforce [sic] this assessment. Without the minimally redacted report, it is almost impossible to find evidence either way, and thus lobby my MP on the issue".

15. He later added that: "Without seeing the (minimally redacted) findings, it is difficult to believe the IOPC's assurance as to MPS probity, particularly in the light of the other findings that "Met Police 'institutionally corrupt' [sic] "".
16. It is of note that there is not a single 'overarching' report, rather there are nine reports which consider each of the parties under investigation; it is understood that the complainant is aware of this. The Commissioner has had full access to these reports.
17. The Commissioner will consider the citing of exemptions to withhold the requested information.

Reasons for decision

Section 40 – personal information

18. Section 40(2) of FOIA provides that information is exempt from disclosure if it is the personal data of an individual other than the requester and where one of the conditions listed in section 40(3A)(3B) or 40(4A) is satisfied.
19. In this case the relevant condition is contained in section 40(3A)(a)⁴. This applies where the disclosure of the information to any member of

⁴ As amended by Schedule 19 Paragraph 58(3) DPA.

the public would contravene any of the principles relating to the processing of personal data ('the DP principles'), as set out in Article 5 of the UK General Data Protection Regulation ('UK GDPR').

20. The first step for the Commissioner is to determine whether the withheld information constitutes personal data as defined by the Data Protection Act 2018 ('DPA'). If it is not personal data then section 40 of FOIA cannot apply.
21. Secondly, and only if the Commissioner is satisfied that the requested information is personal data, she must establish whether disclosure of that data would breach any of the DP principles.

Is the information personal data?

22. Section 3(2) of the DPA defines personal data as:

"any information relating to an identified or identifiable living individual".

23. The two main elements of personal data are that the information must relate to a living person and that the person must be identifiable.
24. An identifiable living individual is one who can be identified, directly or indirectly, in particular by reference to an identifier such as a name, an identification number, location data, an online identifier or to one or more factors specific to the physical, physiological, genetic, mental, economic, cultural or social identity of the individual.
25. Information will relate to a person if it is about them, linked to them, has biographical significance for them, is used to inform decisions affecting them or has them as its main focus.
26. The withheld information in this case directly relates to named employees who are subjects of an investigation. Each report relates to a named individual and includes references to many other named parties. In this regard, the IOPC has advised the Commissioner that it had prepared a report containing an analysis of the number and categories of data subjects, as follows:

"... between them the reports name 328 individuals. However, some of these persons (for example the officers whose conduct was investigated) are named in more than one report, meaning that the number of unique data subjects across all of the reports is fewer than 328. These persons have been categorised in this report as follows:

- Operation Embley 'subjects' (the officers or members of police staff whose conduct was investigated)

- Witnesses spoken to as part of Operation Embley
- Officers under investigation by DPS
- Other (see description)

The investigation reports also include names and other identifiers relating to members of the public, some of whom are persons directly affected by alleged police misconduct.

Each of our nine reports is about the allegations we considered against a single police officer or member of police staff and is therefore focused upon the conduct of one investigation subject.

... the reports refer to the misconduct procedures that were relevant to the officers under investigation, for example referral to the Crown Prosecution Service, suspension, restriction of duties, special requirements and gross misconduct hearings. The reports also identify individuals in connection with their sexual life and mental and physical health”.

27. In the circumstances of this case, having considered the withheld information, the Commissioner is satisfied that the majority of it relates to the nine named parties as well as numerous other named individuals, as described by the IOPC above. He is satisfied that this information both relates to and identifies those concerned. This information therefore falls within the definition of ‘personal data’ in section 3(2) of the DPA.

Could identifying details be redacted from the withheld information?

28. The Commissioner initially notes that the complainant has accepted that there will be personal information within the withheld reports and he has agreed that this can be “minimally redacted to conceal identities”.

29. In covering this point, the IOPC advised the complainant:

“The redaction of exempt information would result in these reports being so heavily edited that the information we disclose would not assist the public in understanding the investigation. In contrast, the information we publish under our policies provides an informative account of our investigations whilst recognising the importance of preserving an appropriate level of confidentiality for the investigation process and the privacy of individuals identified in our reports”.

30. It also advised the Commissioner:

“Given the large number of people connected to the events described in our reports, we consider that the redaction of names

and other direct identifiers would be very unlikely to prevent identification of many of these persons. In our view these reports would be deprived of all meaning and context should sufficient personal data be redacted to avoid identification by a 'motivated intruder'".

31. Were the reports to be redacted to prevent identification of those concerned, the Commissioner is satisfied that the amount of data that would need to be removed would result in the remaining information being of limited value. This is largely on the basis that the parties concerned would still be able to recognise themselves. Furthermore, leaving any details such as job roles and responsibilities would not prevent them being recognised by work colleagues. Therefore, the Commissioner has liaised with the IOPC in an effort to identify any content within each report which can be considered to be the personal data of those concerned. Having done so, he has considered whether or not this personal information can be disclosed.
32. The fact that information constitutes the personal data of an identifiable living individual does not automatically exclude it from disclosure under FOIA. The second element of the test is to determine whether disclosure would contravene any of the DP principles.
33. The most relevant DP principle in this case is principle (a).

Would disclosure contravene principle (a)?

34. Article 5(1)(a) of the UK GDPR states that:

"Personal data shall be processed lawfully, fairly and in a transparent manner in relation to the data subject".

35. In the case of an FOIA request, the personal data is processed when it is disclosed in response to the request. This means that the information can only be disclosed if to do so would be lawful, fair and transparent.
36. In order to be lawful, one of the lawful bases listed in Article 6(1) of the UK GDPR must apply to the processing. It must also be generally lawful.
37. In addition, if the requested data is special category data, in order for disclosure to be lawful and compliant with principle (a), it also requires an Article 9 condition for processing. Furthermore, if the requested data is criminal offence data, in order for disclosure to be lawful and compliant with principle (a), it must also meet the requirements of Article 10 of the UK GDPR.

Is any of the information special category data?

38. Information relating to special category data is given special status in the UK GDPR.
39. Article 9 of the UK GDPR defines 'special category' as being personal data which reveals racial, political, religious or philosophical beliefs, or trade union membership, and the genetic data, biometric data for the purpose of uniquely identifying a natural person, data concerning health or data concerning a natural person's sex life or sexual orientation.
40. Having considered the wording of the request, and viewed the withheld information, the Commissioner finds that some of the requested information does include special category data. He has reached this conclusion on the basis that some of it relates to the sexual life and mental and physical health of those concerned.
41. Special category data is particularly sensitive and therefore warrants special protection. As stated above, it can only be processed, which includes disclosure in response to an information request, if one of the stringent conditions of Article 9 can be met.
42. The Commissioner considers that the only conditions that could be relevant to a disclosure under FOIA are conditions (a) (explicit consent from the data subject) or (e) (data made manifestly public by the data subject) in Article 9.
43. The Commissioner has seen no evidence or indication that the individuals concerned have specifically consented to this data being disclosed to the world in response to FOIA request or that they have deliberately made this data public.
44. As none of the conditions required for processing special category data are satisfied there is no legal basis for its disclosure. Processing this special category data would therefore breach principle (a) and so this information is exempt under section 40(2) of FOIA.

Is any of the information criminal offence data?

45. Information relating to criminal convictions and offences is given special status in the UK GDPR.
46. Article 10 of the UK GDPR defines 'criminal offence data' as being personal data relating to criminal convictions and offences. Under section 11(2) of the DPA personal data relating to criminal convictions and offences includes personal data relating to:
 - (a) The alleged commission of offences by the data subject; or

- (b) Proceedings for an offence committed or alleged to have been committed by the data subject or the disposal of such proceedings including sentencing.
47. Having considered the wording of the request, and viewed the withheld information, the Commissioner finds that the requested information does include criminal offence data. He has reached this conclusion on the basis of the following.
48. All of the reports make reference to the possibility of action by the Crown Prosecution Service ('CPS'), ie that criminality may be uncovered by way of each investigation and that appropriate steps may need to be taken. They include the following statements:

“Criminal offences

On receipt of my report, the decision maker must decide if there is an indication that a criminal offence may have been committed by any person to whose conduct the investigation related.

If they decide that there is such an indication, they must decide whether it is appropriate to refer the matter to the CPS”.

“Investigation reports

Once the investigator has gathered the evidence, they must prepare a report. The report must summarise and analyse the evidence, and refer to or attach any relevant documents. The report must then be given to the decision maker, who will decide if a criminal offence may have been committed by any of the subjects of the investigation, and whether it is appropriate to refer the case to the CPS for a charging decision.

The decision maker must also reach an opinion about whether any person to whose conduct the investigation related has a case to answer for misconduct or gross misconduct, or no case to answer, and may record their view on whether any such person’s performance was unsatisfactory. The decision maker will also decide whether to make individual or wider learning recommendations for the police”.

“Criminal proceedings

If there is an indication that a criminal offence may have been committed by any person to whose conduct the investigation related, the IOPC may refer that person to the CPS. The CPS will then decide whether to bring a prosecution against any person. If they decide to prosecute, and there is a not guilty plea, there may be a trial. Relevant witnesses identified during our investigation

may be asked to attend the court. The criminal proceedings will determine whether the defendant is guilty beyond reasonable doubt”.

49. The reports also indicate that the report author will aim to provide the decision maker with sufficient information about whether they should refer any matter to the CPS. It is for the decision maker to decide whether or not there is any indication that a criminal offence may have been committed by any person to whose conduct the investigation related and whether or not it is appropriate to refer the matter to the CPS.
50. Furthermore, the Commissioner considers that the IOPC’s arguments provided in support of its citing of section 30 in respect of the reports are relevant here too:

“The requested information is held in respect of an IOPC investigation under paragraph 19 of Schedule 3 to the Police Reform Act 2002. Paragraph 23(2) of Schedule 3 provides that on receipt of the investigating officer’s report, the IOPC shall, amongst other things, consider whether the report indicates that a criminal offence may have been committed by any person under investigation and, if the report does so indicate, consider whether it is appropriate to refer the matter to the Director of Public Prosecutions (DPP). ...

We consider, therefore, that these reports fall within the class of information covered by section 30(1)(a)(i) because they are held by the IOPC for the purposes of an investigation it has a duty to conduct with a view to it being ascertained whether a person should be charged with an offence”.

51. The Commissioner is therefore satisfied that the data gathered and presented in each report has been done so to allow a decision maker to ascertain whether or not any criminal offence has been committed by any party (as well as any misconduct matters). The Commissioner is therefore satisfied that the reports each contain criminal offence data of the officers under investigation. Whether or not any such offence was identified and passed to the CPS is not a matter that is being considered. The Commissioner is satisfied that the alleged commission of offences by the data subject is sufficient for the content of the reports, and the evidence gathered from third parties in consideration of each investigation, to be categorised as criminal offence data.
52. Criminal offence data is particularly sensitive and therefore warrants special protection. It can only be processed, which includes disclosure in response to an information request, if one of the stringent conditions of Schedule 1, Parts 1 to 3 of the DPA can be met.

53. The Commissioner considers that the only Schedule 1 conditions that could be relevant to a disclosure under FOIA are the conditions at Part 3 paragraph 29 (consent from the data subject) or Part 3 paragraph 32 (data made manifestly public by the data subject).
54. The Commissioner has seen no evidence or indication that the individuals concerned have specifically consented to this data being disclosed to the world in response to FOIA request or that they have deliberately made this data public.
55. As none of the conditions required for processing criminal offence data are satisfied there is no legal basis for its disclosure. Processing this criminal offence data would therefore breach principle (a) and so this information is exempt under section 40(2) of FOIA.

Information not considered to be personal information

56. As referred to above, the Commissioner considers that the majority of the information contained within the reports is special category data or criminal offence data. However, he also finds that some content would not fall within the category of personal information. This can generally be described as follows:
 - Report title and content list
 - Introduction
 - Policies, procedures and legislation considered
 - Next steps
 - Summary for publication
 - The role of the IOPC
57. The Commissioner has liaised with the IOPC regarding this remaining information and it has agreed that it can be disclosed. The IOPC should therefore comply with the step at paragraph 3 of this notice and disclose the previously agreed information.
58. The Commissioner has not found it necessary to consider section 30.

Section 1 – General right of access

Section 10 – Time for compliance

59. Section 1 of FOIA states that any person making a request for information is entitled to be informed by the public authority whether it holds that information and, if so, to have that information communicated to them.
60. Section 10(1) of FOIA provides that a public authority should comply with section 1(1) within 20 working days.

61. Section 1(1)(b) requires a public authority to provide disclosable information by the completion of the internal review. As it failed to do so, the Commissioner finds breaches of sections 10(1) and 1(1)(b).

Right of appeal

62. Either party has the right to appeal against this decision notice to the First-tier Tribunal (Information Rights). Information about the appeals process may be obtained from:

First-tier Tribunal (Information Rights)
GRC & GRP Tribunals,
PO Box 9300,
LEICESTER,
LE1 8DJ

Tel: 0203 936 8963

Fax: 0870 739 5836

Email: grc@justice.gov.uk

Website: www.justice.gov.uk/tribunals/general-regulatory-chamber

63. If you wish to appeal against a decision notice, you can obtain information on how to appeal along with the relevant forms from the Information Tribunal website.

64. Any Notice of Appeal should be served on the Tribunal within 28 (calendar) days of the date on which this decision notice is sent.

Signed

Carolyn Howes
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